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No. 87-1190

In The Supreme Court Of The United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, *PETITIONER*

vs.

RAY C. BROCE
AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

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QUESTION PRESENTED

Whether a defendant is entitled to a factual determination that a single conspiracy existed after the court determined that two indictments plead to by defendant on their face charged the same conspiracy even though defendant entered a plea of guilty to both indictments pursuant to a plea agreement.

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STATEMENT OF FACTS

Respondents Ray C. Broce and Broce Construction Co., Inc. represent a Kansas Corporation and its owner engaged in the highway construction business with its principal office at Dodge City, Kansas.

On November 17, 1981, a two-count indictment was returned against respondents and others charging a violation of Sec. 1 of the Sherman Act (15 U.S.C. 1) and

mail fraud in violation of 18 USC 1341. ("Broce 1") (U.S. v. Broce Construction Co., Inc. et al., Criminal No. 81-20119-01) (D. Kans). Respondent Ray Broce, president of Broce Construction was identified by the Government as a co-conspirator in Broce I. (Pet. App. 143a-151a)

In Count I of Broce I Indictment, it was charged that the respondents had engaged in a combination and conspiracy to submit colusive, noncompetitive and rigged bids on project No. 23-60-RS-1080 (9) (the Meade County project) led by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began on or about April 1978 and continued thereafter without any date of termination.

In Count II it was charged that the respondents engaged in a scheme and artifice to defraud the State of Kansas and the United States by causing a warrant to be delivered by the United States mail in payment of the project referred to in Count I. (Pet. App. 143a-151a)

By a letter of January 11, 1982, petitioner notified respondents and their attorneys just before trial of the first indictment that the petitioner was going to obtain an additional indictment. This was consistent with petitioner's practice in all prosecutions of alleged bid rigging in the State of Kansas wherein they would notify the respondents prior to trial that in essence that if the respondents did not enter a plea of guilty then petitioner

would obtain another indictment on some other project. After petitioner threatened future prosecution, petioner was notifed that the respondents Ray Broce and Broce Construction wished to enter a plea of guilty to the first indictment. The respondents were in the position of entering a plea of guilty or facing multiple indictments and trials. On January 27, 1982, the respondents entered into a plea agreement with petitioner. Petitioner required that respondents plead to two anti-trust violations with each violation carrying a potential One Million Dollar fine for respondent Broce Construction and One Hundred Thousand Dollars for respondent Ray Broce. Respondent Ray Broce plead guilty to both Counts I and II in the first indictment and was fined and imprisoned on each count. Respondent Ray Broce also was required to plead guilty to the anti-trust violation in the second indictment. Respondent Broce Construction plead guilty to the first count of the first indictment and was fined Seven Hundred Fifty Thousand Dollars. Under the terms of the plea agreement Count II of the second indictment (mail fraud) was dismissed. This eliminated respondent Broce Construction Co. from a potential One Thousand Dollar fine. The petitioner also agreed not to prosecute respondents further in Kansas even though they could not legally do so nor prosecute them in Oklahoma where no charges had nor have ever been filed. Petitioner asks that respondents be presumed guilty of anti-trust violations in Oklahoma without any charges being filed nor

a trial being held. Although the proceedings in Oklahoma are not part of any record in this case, respondent did testify in Oklahoma not pursuant to any plea agreement in Kansas but because he was granted immunity in Oklahoma in exchange for his testimony. Petitioner further agreed to recommend a fine of One and one-half Million Dollars against the corporation on the Sherman Act charges when the maximum legal fine was One Million Dollars. (Pet. App. 127a-128a, 134a-135a)

On February 4, 1982, a second indictment was returned against respondent Broce Construction and respondent Ray Broce. It contained one count for alleged violation of the Sherman Act (15 U.S.C. Sec 1) The indictment in Broce II is identical in all respects to the indictment in Broce I except Jerry Gumm, General Manager of Broce Construction, was eliminated as a defendant; different project numbers are set out with the first indictment referring to a period beginning April 19, 1978 and continuing thereafter without any termination and the second indictment beginning on or about July 19, 1978, and continuing thereafter without any termination; a substitution of terminology where the first indictment refers to "Federal Aid Highway Project" and the second indictment refers to "Public Highway Construction Project" and a paragraph numbering change. (Pet. App. 136a-142a) The respondents and their attorney appeared for a plea on February 8, 1982. Just prior to the plea the respondents and their

attorneys were handed this second indictment. At that time, neither respondnet was advised of their double jeopardy rights. Mr. Crockett, counsel for the respondents at that time, filed a sworn affidavit with the Court that defense counsel did not consider the issue of double jeopardy nor was the issue of double jeopardy discussed with the respondents. Defense counsel did state that he saw no reason "why the Court should not accept these pleas of guilty" (J.A. 43), simply because he didn't see the reason that both indictments charged the same crime (J.A. 72-73). The record clearly demonstrates that the Court advised the respondents of numerous constitutional rights but never at any time discussed the issue of double jeopardy or advised respondents of their double jeopardy rights. The record further shows that this nearly eighty year old respondent in ill health (J.A. 63) was clearly confused as to the government's written statement of facts and there was no clear intention to let each bid-rigging agreement "stand on its own" (J.A. 40-41-42). Petitioner was well aware that any single agreement to rig a bid was necessarily tied to other such agreements. Petitioner states in its official version of the offense that respondents made bid rigging "a way of life" (J.A. 50).

On March 15, 1982, sentence was pronounced in both Broce I and Broce II. The court asked whether there was "any legal reason *** why sentence should not be pronounced" and defense counsel responded:

"None known to the defendant, Your Honor" (J.A. 65). Obviously the defense of double jeopardy was not known to defense counsel or to defendant (J.A. 72-73). In Broce I respondent corporation was fined Seven Hundred Fifty Thousand Dollars and the mail fraud count was dismissed. In Broce II respondent corporation was fined Seven Hundred Fifty Thousand Dollars. Respondent Ray Broce received a fine of Fifty Thousand Dollars and two years imprisonment for each anti-trust charge, the sentences to run concurrent. Respondent Ray Broce was fined the sum of One Thousand Dollars and sentenced to two years on Count II of Broce I. The sentence of imprisonment was concurrent with the previous sentences. The total fine against respondent corporation was One and one-half Million Dollars and the total fine against respondent Ray Broce was One Hundred Thousand Dollars.

On February 22, 1983, respondents, pursuant to F.R. Crim. P. 35 (A) filed a motion to vacate the judgment and sentence in Broce II, claiming that the judgment and sentence in Broce II was illegal in that it violated the double jeopardy clause of the Fifth Amendment of the United States Constitution. Respondents by this motion gave the government notice that respondents were not going to be bound by the plea agreement that violated their rights of double jeopardy. The government could have then filed any charges they felt they could support in Kansas, Oklahoma or any other state. To this date

no additional charges have been filed. The petitioner has instead chosen to attempt to enforce a plea agreement that voids the double jeopardy rights of respondent that were never considered, discussed nor therefore knowingly waived. The motion was made after a decision filed January 31, 1983, in a similar case in the State of Kansas involving other indicted corporations and defendants for bid rigging. In *United States of America v. Beachner Construction Co., Inc.*, 555 S. Supp 1273 (D Kan. 1983) which was affirmed by the court of appeals (729 F.2d 1278 (1984)), District Judge Saffels found after an evidentiary hearing that the conspiracy to rig bids on Kansas highway construction projects was a continuing conspiracy and that subsequent prosecutions of an acquitted corporation constituted double jeopardy. The district court denied the motion of respondents by concluding that respondents had waived their right to the double jeopardy claim and their right to challenge the sentence on that basis by pleading guilty. The district court did not address the question of whether there was one or multiple conspiracies. (Pet. App. 112a-123a)

The court of appeals reversed in *United States v. Broce*, 753 F.2nd 811 (10th Cir. 1985) and petitioner requested a new hearing *en banc*. The Court sitting *en banc* concluded from the facts that the plea of guilty did not waive the defense of double jeopardy under the circumstances of this case. *United States v. Broce*, 781 F.2d 792, (10th Cir. 1986). The Court remanded

the case for a determination on the evidence as to the existence of a single or separate conspiracy. Although petitioner stipulated that the record in the Beachner evidentiary hearing be used as part of the factual record they contend that in a memo they sent to the district court they preserved their argument that respondents forfeited any double jeopardy defense. (Pet. App. 22a) The record shows Judge Saffels analized the usual and common system of setting up Kansas highway jobs; the common language; the lack of precautions; the continuing obligations among contractors; the necessity of telling other contractors if everyone had agreed "to go along", the common purpose and objective; and concluded that bid rigging was "a way of life in Kansas". (Pet. App. 22a-23a)

Guided by the common objective test in *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir.) Cert. Denied, 400 U.S. 829 (1970) the District Court held that the conspiracies charged as anti-trust violations in Broce I and Broce II were a single conspiracy and ordered the conviction in Broce II vacated as to respondents. (Pet. App. 5a-13a)

Petitioner once again appealed arguing that the District Court erred in finding that factually there was one continuing conspiracy. The government also urged the court to reconsider its en banc opinion of January 2, 1986.

The court of appeals, after considering this Court's most recent case in this area of the law, *Ricketts v. Adamson*, No. 86-6 (June 22, 1987), wrote (Pet. App. 1a-3a):

> ". . . Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. Id. at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 20-31 (1974). To the extent that the government's first argument may read as requesting reconsideration of the court's en banc dispostion, we will not do so. 10th Cir. R. 35.6
>
> The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly erroneous. cf *United States v. Beacher Construction Co.*, 729 F.2d 1278, 1281-83 (10th Cir. 1984)."

Petitioner's request for rehearing was denied and the petitioner's suggestion for rehearing en banc was also denied (Pet. App. 124a-125a)

SUMMARY OF ARGUMENT

There is no dispute that the double jeopardy clause in the Fifth Amendment prohibits the infliction of multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). There is no dispute that if the two indictments brought against these defendants were based upon and reflect only one conspiracy then the defendants may not be punished twice. The position that a counseled plea of guilty waives a conviction to a charge that violates the double jeopardy clause has been specifically rejected by this Court. *Menna v. New York*, 423 U.S. 61 (1975). The Court of Appeals correctly interpreted the decision in *Menna* to act as a bar to the government's attempt to obtain two convictions for the same conspiracy. The government seeks to establish that the indictments clearly charge two separate conspiracies and secondly seeks a determination that *Menna* does not apply to a counseled plea of guilty when there is a plea agreement.

A. The petitioner's claim of waiver is based in part upon the government's interpretation that the indictments clearly charged two separate conspiracies on their face. The respondents by entering their plea of guilty have admitted their guilt as conspirators. The defendants continue to admit their factual guilt in that they conspired to rig bids on projects let by the State of Kansas. However, since there was a single, continuing

conspiracy to rig as many bids as possible on projects in the State of Kansas, the petitioner could legally charge the crime of conspiracy but once against these defendants.

Each indictment brought against the defendants was couched in vague terms to conceal the fact that the government was seeking two convictions for one criminal act.[1] The indictments merely show that the defendants were involved in a continuing conspiracy to which the defendants have admitted their factual guilt. The indictments do demonstrate that during the terms of the conspiracy the defendants conspired to set up more than one project involving different sections of Kansas road projects. However, the indictments on their face do not demonstrate separate conspiracies and in fact allege the conspiracies in each indictment to be taking place over the same period of time.

B. Petitioners next raised the issue as to whether the fact that the defendant entered into a plea agreement constitutes a waiver of a double jeopardy claim. This Court has held in *Menna* that a conviction must be set aside even if it was entered pursuant to a counseled plea of guilty where the United States Constitution precludes the prosecution of a second charge. *Menna*

[1]Each indictment charges the same conspirators with the exception that Gerald R. Gumm was omitted from the second indictment by agreement. The other conspirators charged that in each indictment are various persons and firms not made defendants herein. Each indictment refers to the time of the conspiracy with a statement "the exact dates being to this grand jury unknown." (Pet. App. 137a and 144a, 139a and 147a)

did not specifically state that the charges must be set aside even if the conviction was entered pursuant to a counseled plea of guilty which is reduced in writing in a form of plea agreement. The obvious interpretation of *Menna* is that a second conviction for the same offense in violation of the double jeopardy clause of United States Constitution is equally invalid after a counseled plea of guilty where a plea agreement drawn by the government has been entered into by the defendant to prevent further prosecutions for the same offense.

To allege that the respondents receive substantial benefits from the plea agreement is to ignore reality. The government promised not to prosecute them for bid-rigging activity in Kansas for which the government received a conviction. The petitioner never had a legal basis to pursue the defendants with multiple prosecutions because the defendants were part of one continuing conspiracy to rig bids on highway projects in the State of Kansas. The government's promise not to pursue multiple indictments for being part of a single conspiracy was only an agreement that the government would not again violate the double jeopardy clause of the United States Constitution. There were no indictments pending against the defendants in the State of Oklahoma nor had the defendants been notifed of any potential charges. The government seems to argue the position that the second conviction in the State of Kansas was in reality a conviction for the defendants' activity in the State of Oklahoma. Petitioner advances the argument that a plea agreement constitutes a type of contract. Certainly a contract requires an understanding from both sides as to the rights of each party. In this case, the Kansas counsel was faced with the government's promise of future indictments for the same conspiracy in the State of Kansas. It was the threat of future indictments based upon a single conspiracy that led Kansas counsel to enter into a plea agreement for his client. Unfortunately, the Kansas counsel never considered the legality of the government's position. It is unrealistic to advance the position that the Kansas counsel was advising his client to plead guilty to criminal acts in other jurisdictions where no allegations had been made nor charges brought against defendants.

Petitioners argue that the defendants sought to avoid the greater liability for other bid-rigging activities in both Kansas and Oklahoma. In reality there were no other charges for the government to pursue. Petitioners furthermore notified the defendants that the plea agreement did not constitute a bar to prosecution in the State of Oklahoma. The defendants by their motion brought within thirteen (13) months of the sentencing date to vacate the sentence put the government on notice that the defendants considered the plea agreement invalid and a violation of their constitutional rights.

ARGUMENT

RESPONDENTS DID NOT WAIVE THEIR DOUBLE JEOPARDY RIGHT BY ENTERING A PLEA OF GUILTY.

The leading case concerning waiver of the double jeopardy provision of the Fifth Amendment of the Constitution is *Menna v. New York, supra.* In that case, Menna had refused to answer questions before a New York State grand jury after a grant of immunity. He was adjudged in contempt and sentenced to thirty (30) days in jail which he served. Approximately two years later he was indicted for the same conduct. Menna entered a counseled plea of guilty to the indictment after asserting unsuccessfully in the state court that the indictment violated the double jeopardy provision of the Fifth Amendment. He appealed raising the double jeopardy claim but the New York Court of Appeals declined to address the double jeopardy claim on the merits, holding that it had been waived by Menna's counseled plea of guilty.

The United States Supreme Court reversed in a *per curiam* decision holding that where the State is precluded by the United States Constitution from hauling a defendant into a Court on a charge, Federal Laws require that a conviction on that charge be set aside even if conviction was entered pursuant to a counseled plea of guilty. Some ambiguity is created by the Court's

statement in footnote 2 that "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that — judged on its face — the charges on which the State may not constitutionally prosecute." The Court left unanswered the question of what constitutes a valid waiver of a Fifth Amendment claim and whether a plea of guilty entered pursuant to a plea agreement constitutes a waiver of the double jeopardy claim. Since most, if not all pleas of guilty, are subject to some negotiations, it would seem logical that a plea agreement has no more effect on an invalid charge than the fact that the defendant was represented by counsel.

This Court's ruling in both *Blackledge v. Perry,* 417, U.S. 21 (1974), and *Menna,* hold that the government is prohibited from instituting charges that violate the Fifth Amendment double jeopardy clause. The prohibition is absolute and the defendants entering into a plea agreement does not confer upon the government the right to violate the constitution any more than the defendants entering a plea of guilty. In *Blackledge,* the defendant was convicted of a misdemeanor and sought a trial *de novo* in a higher court. The prosecution returned a felony indictment for the same conduct upon which the defendant had been convicted of a misdemeanor. This Court overturned the defendant's conviction which resulted from a plea of guilty to the felony charge holding that it violated the due process clause.

This Court stated that the claim of constitutionally goes to "the very power of the State to bring the defendant into Court to answer the charge," *Blackledge*, 417 U.S. at 30. The respondents complaint goes to the same constitutional prohibition and that is the power of the government to bring a second indictment which violates the double jeopardy clause. Petitioner asks the Court to reject the rulings in *Blackledge* and *Menna* and apply *Tollett v. Henderson*, 411 U.S. 258 (1973) and the *Brady* trilogy.[2] This Court recognized in *Tollett* and the *Brady* Trilogy that there were circumstances in which a defendant may decide to enter a plea of guilty rather than face the uncertainty of trial. All these cases deal with the validity of the defendants conviction based upon the defendants admission of factual guilt and not the legal right of the government to institute charges in the first place.

The government further relies on *Ricketts v. Adamson*, No. 86-6 (June 22, 1987) where a majority of this Court found that it was the defendants intent under the specific terms of that plea agreement to waive his double jeopardy rights. In *Ricketts* the defendant entered into a plea agreement specifically stating that the reduction in charges was based upon his agreement to testify against other defendants. This Court found under the terms of that agreement that the defendant

[2]*Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

had specifically intended to waive his double jeopardy rights. A waiver of a double jeopardy claim must be a waiver as defined in *Johnson v. Zerbest*, 304 U.S. 458 (1938). That case defined a waiver as the intentional relinquishment or abandonment of known right or privilege. In this case the government couched its indictment in vague terms to conceal the very nature of a double jeopardy claim. The defendant was not aprised of his double jeopardy rights and his counsel failed to consider the double jeopardy claim.

A. THE VAGUE INDICTMENTS BROUGHT BY THE GOVERNMENT REQUIRE A FACTUAL DETERMINATION OF THEIR VALIDITY.

The indictments in this case refer to two different Kansas Highway projects but to only one conspiracy. The essence of a conspiracy offense is an agreement to commit an unlawful act. *Ianelli v. United States*, 420 U.S. 770 (1975). A single agreement to commit more than one criminal act is still a single agreement and may not be prosecuted as more than one conspiracy. *Braverman v. United States*, 317 U.S. 49 (1949). Although the government admits that there was a single conspiracy at one time it offered no evidence of the conspiracy's termination. (J.A. 50) A conspiracy, once shown to exist, is presumed to continue until proof of its termination is established. The government alleged and the Trial Court agreed that the defendants were part of a conspiracy that had made "bid-rigging a way of life in

Kansas." It is the government that retains exclusive control over the drafting of indictments. In *United States v. Inmon*, 568 F.2d 326, 332 (3rd Cir. 1977), aff'd on rehg, 597 F.2d 352 (3rd Cir. 1979) the Court stated "besides the practical considerations respecting access to proof, to which we referred earlier, we also point to the obvious fact that the government has control over the drafting of the indictments. Any burden imposed by the imprecision of separate offenses should be borne by it." The government contends that the indictments are facially valid because each refers to a different project which therefore constitutes two different agreements. The government confused the nature of a conspiracy as opposed as to the actual agreement to set up a project. The government appears to argue that a conspirational "agreement" must be shown that incompasses a specific, explicit, meeting of the minds, and consideration, much in the form of a formal contract. "[N]o formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco Company v. United States*, 328 U.S. 781, 809 (1946). A tacit understanding based upon a long course of conduct has been held sufficient to constitute a conspirational agreement. *Direct Sales Co. v. United States*, 319 U.S. 703 (1973); *United States v. Consolidated Packing Corp.*, 575 F.2d at 126.

The rulings in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981) and in *Kotteakos v. United States*, 328 U.S. 750 (1946) are not controlling in this case. In

Kerrigan the defendant was sentenced on the basis of guilty pleas on two indictments which the Court found specifically eliminated the claim of double jeopardy. Both indictments in *Kerrigan* were alleged to commence on a specific date and the conspiracy ended on a specific date. The Court found that there were two different indictments alleging separate periods of times for the two conspiracies which overlapsed by only one day. The Court specifically noted that the indictments named overlaping but different groups of conspirators. *Kerrigan v. United States*, 644 F.2d 47 at 49. The Court in *Kerrigan* found from the face of the indictments that "the two agreements charged related to commission of crimes which were similar but distinct." In this case the government admits in its own drafting of its indictments that each project was let at a given bid letting on a specific date and that the conspiracy continued thereafter, the exact dates being to this grand jury unknown. The conspirators in each indictment were the same persons and firms with the exception of the government's general allegation that various persons and firms not made defendants herein participated as co-conspirators. The only difference alleged by the government is that the projects which were subject to the conspiracy were bid on separate dates.[3]

[3]Judge Bohanon in the original opinion of Court of Appeals panel dated January 9, 1985, made a paragraph by paragraph comparison of the two indictments and found them to be identical in many respects and regarding the differences found that nothing in either indictment demonstrates two separate conspiracies. Judge Bohanon's analysis is not repeated here as it appears in petitioners appendix pages 102a to 106a.

The government's reliance on *Kotteakos v. United States*, 328 U.S. 750 (1946) is misplaced. In *Kotteakos* none of the co-conspirators, except one, participated in any way, by agreement or otherwise, in the individual transaction. 328 U.S. at 754. The Supreme Court distinguished *Kotteakos* in a subsequent case where, as here, aid was given to other co-conspirators and there was a common objective among them. *Blumenthal v. United States*, 322 U.S. 539 (1947) It cannot be the government's election to decide arbitrarily if there is one agreement or several.[4]

It is this type of conduct that Justice Brennan spoke to in *Abbate v. United States*, 359 U.S. 187, at 196 (1959) where he points out that the basis of Fifth Amendment protection against double jeopardy is that a person shall not be harassed by separate trials. *United States v. American Honda Motor Co.*, 271 F.2d 979 (N.D.Cal. 1967).

The contention that setting up a given project on specific terms establishes that a new conspiracy exists is without merit. The government in its brief places dis-

[4]As stated in *United States v. Palermo*, 410 F.2d 468, 470 (7th Cir. 1969) "The government is not free to arbitrarily decide whether there is one agreement or several. If the agreement . . . contemplates bringing to pass a continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies rather than to call it a single one. *United States v. Kissel*, 218 U.S. 601, 607 (1910). To convict a party severally for being part of two conspiracies when in reality he is involved in one overall conspiracy would be convicting him of the same crime twice."

torted emphasis on Mr. Broce's statement that each project would "stand on its own" (J.A. 41). Mr. Broce is alleged to have made the statement to a contractor at a bid letting when that contractor requested a future project in consideration for not bidding a project at that letting. The defendants do not contend that all projects were set up at the same time or that the "setting-up" of future projects did not depend upon the availability of projects, the size of the companies and the number of projects already allotted to a given conspirator. What is clear from Mr. Broce's statement is that there was no doubt in the conspirators minds that future projects would be set up if possible. The statement itself is clear proof of a continuing conspiracy. There is no evidence of withdrawal from the conspiracy or any acts which constitute a termination of a conspiracy and every intent existed among the contractors to set up the future projects at the time of the letting. While the terms of each project may not have been fully worked out there was never any doubt that the conspiracy was in place to be plugged into by the contractors.

The government seeks the benefit of bringing charges of a continuing conspiracy in each indictment because it allows the government to introduce "similar acts" in their case in chief. However useful this tactic is to the government it should not be used to contravene constitutional guarantees and if the government chooses to draft indictments in this form it must do so with the

understanding that a conviction for a second indictment cannot stand if it involves substantially the same conspiracy as the first. *Short v. United States*, 91 F.2d 614 (4th Cir. 1937) The defendants admission of factual guilt goes only to the nature of the conspiracy and not to whether one or more conspiracies existed. *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978) As the Court of Appeals held, it appears on the face of the indictments that one agreement was involved and hence one conspiracy. The Court of Appeals correctly remanded the case to District Court for a factual determination as to the nature of the conspiracy. The government had previously stipulated that the *Beachner* transcript was to be made part of the record for the basis for determining the nature of the conspiracy. The record before the Court clearly demonstrated a single conspiracy.

B. THE GOVERNMENT'S REQUIREMENT AS PART OF A PLEA AGREEMENT THAT THE DEFENDANT ENTER A PLEA OF GUILTY TO TWO INDICTMENTS DOES NOT INVALIDATE THE DOUBLE JEOPARDY CLAIM.

The government claims that its reliance upon its contract with the defendant should act as a bar to defendant's constitutional right against double jeopardy. The facts of this case are not consistent with the concept of a voluntary and intelligent waiver of rights by a plea agreement as contemplated in *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). At the time Ray Broce entered

a plea for himself and both construction companies he was an eighty year old defendant in ill health facing his first criminal conviction. Shortly before trial on a charge of conspiracy to violate anti-trust laws, Mr. Broce and his attorney were notified that the government was considering additional prosecutions against Mr. Broce and Broce Construction Company in the State of Kansas. The defense attorneys notified the government on behalf of their clients that the defendants wished to enter a plea of guilty. The government required the defendants to plead guilty to two counts of anti-trust violations and returned a second indictment just four days prior to the plea hearing. Threatened by government prosecutors with a series of indictments for each highway project the government believed to have been rigged, defendants accepted the plea bargain in the form of an agreement. On February 8, 1982, the defendants entered pleas of guilty to both indictments. At that hearing, the defendants were apprised of numerous constitutional rights and the Court stated to the defendant "and do you understand that by entering pleas of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?" (J.A. 34-35) The Court inquired of Mr. Broce if he had gone over the four page statement of facts in support of the pleas and his response was "I guess I have". (J.A. 40) The defendants were never advised of any right against double jeopardy by the Court, the government or their own

attorneys. Counsel for the defendants in fact filed an affidavit stating that they had never considered the prohibition against double jeopardy. The defendants never contemplated a waiver of their double jeopardy rights. The rule is that Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbest, supra.* The government basis their claim of an intentional relinquishment or abandonment of a known right or privilege upon the existence of a plea agreement. The facts in this case are clearly distinguishable from *United States v. Scott,* 437 U.S. 82 (1978). In that case the defendant moved for a dismissal of two counts of an indictment and this Court found that the deliberate choice to seek termination of those proceedings on a basis unrelated to factual guilt or innocence suffers no injury cognizable under the double jeopardy clause. In *Ricketts v. Adamons, supra* this Court found that respondent unquestionably understood the meaning of the provisions of the plea agreement and that the terms of the agreement could not be clearer. In neither case did this Court condone two convictions for one criminal offense.

In this case it was not the actions of the defendants which caused them to be subject to two prosecutions for a single offense. The petitioner boldly asserts that the defendant receive substantial benefits from the plea bargain. The corporation did have Count II which was

for mail fraud dismissed. The government gave up a potential fine of One Thousand Dollars in exchange for a potential fine of One Million Dollars. The plea agreement further provided that the defendants would not be prosecuted for additional crimes on account of any colusion between defendant and other contractors regarding highway, street or airport runway construction projects let by awarding authorities within the State of Kansas and Oklahoma prior to the date of the agreement. Since it has been established that there is only one conspiracy in the State of Kansas no additional prosecutions were possible even absent a plea agreement. No indictments existed in Oklahoma and any potential indictments would be purely speculative. The defendants were informed by the government that if they cooperated and testified in Oklahoma then the government would not seek to prosecute defendants in Oklahoma but it is clear that it was the threat of multiple prosecutions in Kansas that caused the guilty pleas to be entered.

Both *Ricketts* and *Scott* cited by petitioner rely on charges that the government had a constitutional right to bring against the defendants in the first place. The plea bargain entered into by the respondents rely upon a charge that the government could never constitutionally bring against the defendants. The reason petitioner does not seek the same remedy sought in *Ricketts* is because *Ricketts* was based on a constitutionally valid

charge whereas without specific performance of the plea agreement the government could not through any legal prosecution obtain the penalty imposed in this case. As stated in *Menna*, a constitutionally invalid charge is not made valid by a counseled plea of guilty. Nor is a constitutionally invalid charge made valid by a counseled plea of guilty pursuant to a plea agreement. The government is not in the position to advance the theory of equity when any disadvantage the government suffered was due to its own actions.

CONCLUSIONS

The judgment of the court of appeals should be affirmed.

Respectively submitted.

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